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737843—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1078

VACU-MATIC CARBURETOR COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 950) is reported in 157 F. 2d 711.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on December 6, 1945 (R. 996), following its denial of a petition for rehearing (R. 995). The petition for a writ of certiorari was filed on February 28, 1947. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended.

QUESTION PRESENTED

Whether the evidence supports the findings of the Federal Trade Commission that representations made by petitioner with respect to its Vacumatic device were erroneous and misleading and constituted unfair and deceptive practices in commerce in violation of the Federal Trade Commission Act.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C. sec. 45, provides in part:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful. * * *
>
> (c) * * * The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. * * *

STATEMENT

The Federal Trade Commission issued a complaint charging petitioner with violating Section 5 of the Federal Trade Commission Act by making false and deceptive representations in the sale of its product which tended to mislead the purchasing public (R. 31–35). After a hearing the Commission made the following findings:

Petitioner is engaged in the manufacture and sale of a mechanical device, called the "Vacu-

matic", which is attached to an automobile engine between the carburetor and the intake manifold.[1] To induce sales petitioner has represented in advertisements and by other means that the use of its device results in quicker starting, faster acceleration, more power, a smoother-running engine, and a substantial reduction (up to 30%) in gasoline consumption (R. 924–926). Tests of the device, conducted in accordance with recognized engineering standards by the National Bureau of Standards and a leading manufacturer of carburetors, establish that the device serves no useful purpose in the carburetion of gasoline in an automobile engine and has no appreciable effect upon the operation of an engine except that with respect to improperly adjusted carburetors in which the fuel mixture is excessively rich the amount of additional air admitted by the Vacumatic, though negligible when compared with the total amount of air used by the motor, may serve to "lean" the mixture and thereby reduce to some

[1] The device consists essentially of a small cylinder containing a piston which rests on a spring. The piston, operated by the differential pressure between the intake manifold and the atmosphere, moves within the cylinder to open and close a small hole which permits additional air to enter the intake manifold. Petitioner claims that the admission of this additional air at the proper time causes less gasoline to be drawn from the carburetor and, additionally, that the manner of admission increases the "turbulence" (swirl of air) within the motor causing a more explosive and efficient mixture of gasoline and air (R. 926).

extent the amount of gasoline consumed. The conclusion derived from such tests is supported by the opinion of experts in the automotive and carburetor engineering fields. (R. 926–928.)

Petitioner relies principally on certain road tests which, if authoritative, would indicate that use of the device reduces gasoline consumption. It is doubtful that road tests can be accepted at face value. Engineers generally recognize them as less reliable than laboratory tests because of inability to control to the same degree such variable factors as temperature, barometric pressure, humidity, wind resistance, road conditions, density of traffic, and the manner in which the automobile is driven. Included in the tests made by the Bureau of Standards and the carburetor manufacturer were road tests, the results of which supported the laboratory tests. (R. 927.)

The Commission concluded that petitioner's representations were erroneous and misleading and that its practices constituted unfair and deceptive practices in commerce within the meaning of the Federal Trade Commission Act (R. 928). Upon these findings the Commission ordered that petitioner cease and desist from representing that the Vacu-matic or any similar device, when used on an automobile engine, would result in the claimed advantages such as quicker starting or increased power, or would perform any useful service in the carburetion of gasoline,

unless the representations were expressly limited to a possible reduction in gasoline consumption in cases in which, due to improper carburetor adjustment, the fuel mixture was excessively rich (Order, R. 929–930).

ARGUMENT

The petition presents no question of sufficient substance to merit review by this Court. Though petitioner casts the alleged errors of the Circuit Court of Appeals in various forms, its sole complaint, with a minor exception, is that the court erroneously ruled that the findings of the Commission were supported by substantial evidence. Certiorari will not be granted, in the absence of unusual circumstances, merely to review questions of fact. *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 208.

We submit that the Commission's findings are not only supported by substantial evidence, but are clearly required by the evidence. Exhaustive tests of petitioner's device were made both by the National Bureau of Standards and Bendix Stromberg Carburetor Company, with results substantially similar in establishing that petitioner's device was of no appreciable value of itself and incapable of producing the results which petitioner claimed for it in its advertising campaign (R. 819–821, 834–839). Contrary to petitioner's claims, these tests were made while the device was

open and operating and in such a manner as to determine fully its potentialities (R. 821, 830–831, 837–838).

Eight automotive engineers of experience and standing testified on behalf of the Commission, including such experts as the engineer in charge of the Carburetor Laboratory of the Chrysler Corporation, the assistant chief engineer of the Dodge Division of Chrysler Corporation, and the engineer in charge of the design and operation of all carburetors used by Chevrolet Motor Company (R. 727, 754, 769). A typical example of the testimony of these experts is that given by the engineering executive in charge of carburetion for the Stromberg Division of Bendix. When shown a Vacu-matic device, he testified that it was quite an old idea,[2] that devices similar to the Vacu-matic had been presented to him for experimentation over an 18-year period; that he had tested them repeatedly and found they would do just what science and engineering analysis would indicate, and that the Vacu-matic was practically valueless (R. 579–592).

In behalf of its position, petitioner offered only the opinion evidence of a few users and its own officials, based on unreliable tests (R. 144–187; 351–381), and the result of one scientific test con-

[2] Other expert witnesses testified to a long familiarity with devices similar to the Vacu-matic which they denominated "manifold air-bleeds" (R. 488–489, 598, 741, 765, 790).

ducted by an automotive engineer (R. 129–143, 869). This was a road test and the evidence indicated beyond doubt that tests made under laboratory conditions are far more reliable in determining the performance of petitioner's device. An expert of the Bureau of Standards, the author of several published papers on the relative accuracy of tests of automotive engines (R. 256), testified that the limits of experimental error of the test conducted by petitioner's lone expert would be about 10 percent, and that such limits as to the tests referred to by petitioner's other witnesses would be about 20 or 30 percent, except for one test which might be correct within 10 or 15 percent. (R. 270.)[3]

Since petitioner also urges that the hearing before the Commission violated the most fundamental rules of evidence and the most fundamental concepts of fair play (Pet. 28), we think it appropriate to notice, for illustrative purposes,

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[3] This expert, with some 16 years experience in testing and research work in automotive laboratories, testified that the precision of a laboratory test is approximately ten times as great as a road test, that that means an average taken from 100 road tests would have a value equal to one laboratory test (R. 241), that these figures in comparing the precision of laboratory and road tests were not arbitrary figures but were the results of statistical analysis and "the summation of * * * approximately 20 years of testing in the laboratory and on the road, and comparing the extent to which supposedly identical tests agree in results" (R. 253–256). Petitioner's lone expert agreed that a laboratory block test "is the most accurate test of all" (R. 140).

what petitioner characterizes as "one of the sharpest examples" of the asserted failure to preserve essential rules of evidence (Pet. 61). It is asserted that the tests made of the Vacu-matic device by the Carburetor Company were computed with the aid of a formula or constants with no attempt to show their correctness and as to which the witness who used them as a starting point was unable to say whether or not they were correct. In fact, the "constants" are conversion factors used to convert fuel consumption in time into mileage realized per gallon of gasoline. These constants, serving simply to shorten mathematical calculations, had been developed at the Carburetor Company to perform the conversion function and were in constant, routine use. There was no evidence to suggest that the constants were inaccurate; if they were, their inaccuracy would not affect the tests since the same constants were used to convert the results of engine operation with and without the Vacu-matic device. Moreover, the unconverted results remained available (R. 522, 524, 602–605, 617–620).

Petitioner's contention that the substitution of examiners resulted in denial of a fair hearing was first raised upon appeal; it made no objection to the procedure before the Commission and in fact consented to the last substitution (Comm. Exs. 52, 53, unprinted; R. 954). *Cf. Federal Trade Commission* v. *S. Buchsbaum & Company,* 328 U. S. 818.

CONCLUSION

The decision below is correct and not in conflict with the decision of this Court or of any other circuit court. No question of importance is presented. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947